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Supreme Court, U.S.
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NO. 95-186

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

MAURICIO RUEBEN
Petitioner

VS.

THE UNITED STATES OF AMERICA
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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22 pp

QUESTION PRESENTED

I. Whether the Fifth Circuit Court of Appeals' ruling that a defendant is not entitled to an evidentiary hearing to meet his burden of proving the government's refusal to follow a plea agreement was based upon an unconstitutional motive:

a) Is in conflict with this Honorable's Court's decision in Wade v. United States, infra; and

b) Is constitutionally infirm in that it is in violation of the Due Process Clause.

LIST OF PARTIES IN APPELLATE COURT

Mauricio Rueben,

Appellant,

United States of America,

Appellee

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REFERENCE TO OPINIONS OF LOWER COURT

The opinion of the Fifth Circuit Court of Appeals is reproduced in the appendix.

JURISDICTION

The Court of Appeals had appellate jurisdiction over the district court's final judgment in this criminal case, pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291. The panel's order was entered on March 31, 1995. See A-3. Consistent with this Honorable Court's Rule 13, this Petition is timely filed. This Court's jurisdiction in the instant case is based on 28 U.S.C. § 1254(1), and United States Supreme Court Rule 10.

CONSTITUTIONAL PROVISION AT ISSUE

The Due Process Clause of the Fifth Amendment to the United States Constitution states:

> "...[N]or shall any person be deprived of . . . liberty . . . without due process of law."

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked pursuant to the indictment filed in the United States District Court for the Southern District of Texas, Houston, Division.

The Petitioner, Mauricio Reuben, was originally indicted on April 18, 1991, by a federal grand jury in the Southern District of Texas. A third superseding indictment was filed August 8, 1991, charging Appellant in Count 1 with conspiracy to possess with intent to distribute in excess of 1,000 kilograms of marijuana, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846; in Count 2 with conspiracy to commit Interstate Travel In Aid of Racketeering ("ITAR"), in violation of 18 U.S.C. § 1972 and 18 U.S.C. § 371; in Count 15 with possession with intent to distribute and distribution

in excess of 50 kilograms of marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(c) and 18 U.S.C. § 2; in Counts 13, 14, 16, 26 and 97 with ITAR, in violation of 18 U.S.C. §§ 1952 and 2; in Count 41 with conspiracy to commit money laundering, in violation of 18 U.S.C. §§ 1956 and 2; in Counts 38, 40, 53, 55 and 60 with money laundering, in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i) and 2; in Counts 12, 25, 27, and 96 with possession with intent to distribute and distribution in excess of 100 kilograms of marijuana, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(vii); in Count 43 with conspiracy to structure cash received in business/trade, in violation of 26 U.S.C. 7203, 6050I(F)(1)(A), (B), and (C) and 7206, all in violation of 18 U.S.C. § 371; in Counts 54 and 62 with structuring cash received in violation of 26 U.S.C.

6050I(A) and 7203; and in Count 61 with structuring a currency transaction, in violation of 31 U.S.C. § 5324(A) and 18 U.S.C. § 2.

On February 13, 1993, Petitioner appeared before the Honorable Lynn N. Hughes, United States District Judge for the Southern District of Texas, Houston Division, and entered a plea of guilty to Counts 1 and 38 of the indictment, pursuant to a written plea agreement.

The plea agreement provided that the government would file a motion for downward departure, pursuant to U.S.S.G. § 5K1.1, if in its discretion Petitioner was determined to have provided substantial assistance.

Petitioner was interviewed several times by the government regarding his participation in the criminal activity. During this interview process, the

government began to question his truthfulness and eventually concluded that he was not fully admitting his own guilt. In turn, the government, acting upon its discretion, refused to file the motion for downward departure on the belief that the Petitioner did not provide substantial assistance.

In response to the government's position, Petitioner moved for specific performance of the plea agreement, or in the alternative to withdraw his plea of guilty. Additionally, Petitioner filed a motion for discovery, requesting the statements of all co-defendants pursuant to Fed. R. Crim. Proc. 32(e). The government was relying on the statements of other cooperating co-defendants in formulating the position that the Petitioner was not being truthful. The motion for discovery was denied beyond

that of the notes taken by the government during the Petitioner's debriefing.

Following a non-evidentiary hearing, the district court determined that the government had made a prima facie showing that it had a rational basis for refusing to file a substantial assistance motion under § 5K1.1 of the sentencing guidelines. On January 24, 1994, the district court sentenced Appellant to imprisonment for a term of three hundred sixty (360) months.

ARGUMENT

I.

THE PETITIONER WAS DENIED DUE PROCESS BY THE DISTRICT COURT'S DENIAL OF AN EVIDENTIARY HEARING NECESSARY TO SHOW THE GOVERNMENT ACTED UNCONSTITUTIONALLY IN REFUSING TO FOLLOW A PLEA AGREEMENT

In alleging a breach of a plea agreement, a defendant bears the burden of proving the breach. In providing that the government breached a particular provision of a plea agreement, where they retained discretion to act, it must be shown that the government's failure to perform was due to some "unconstitutional motive." See United States v. Wade, ____U.S.____ 112 S. Ct. 1840, 118 L.Ed.2d 524 (1992. If the prosecutor's exercise of discretion exceeds constitutional limitations, the district court can enforce a plea agreement. Id.

In the instant case, the panel

accepted the district court's conclusion that the government's exercise of discretion was justifiable, and was not so arbitrary to be unconstitutional. (Appendix, p. 5). The panel further found that had Rueben shown that the government arbitrarily found that he failed to provide substantial assistance, or that they had an unconstitutional motive, Rueben would be entitled to relief. (Appendix, p. 16).

The panel held that Rueben did not meet his burden because he only made general allegations that he provided substantial assistance. (Appendix, p. 17). Id. In conjunction with this finding, the panel further found that Rueben was not entitled to an evidentiary hearing. (Appendix, p. 18). The panel's ruling is based upon an erroneous premise. Further, the panel stated that

the government presented its interview notes, which reflected that Rueben's statements were inconsistent with those of his co-defendants and were not completely truthful. This contention was never proved since it was only the government's proffer and they presented no evidence to substantiate this position. The entire purpose of Rueben's filing his Motion for Discovery and Inspection to Prepare for Hearing for Specific Performance to Enforce the Plea Agreement was to disprove this point. The district court in denying Rueben this discovery precluded his ability to substantiate that the government acted arbitrarily and/or unconstitutionally.

As argued in the district court, and submitted in Appellant's brief, Rueben requested that he be allowed the opportunity to review the statements of

his co-defendants and that he be allowed to confront and cross-examine these persons. See Brady v. Maryland, 373 U.S. 83 (1963), Fed. R. Crim. Pro. 16, 26, and 32. Without such an opportunity, there was not any way to determine whether the government acted arbitrarily in arguing that Rueben was not truthful, and, thus, had not provided "substantial assistance."

This Honorable Court has ruled that in contesting the actions of the government in refusing to file a "substantial assistance" motion, a defendant has a right to an evidentiary hearing if he makes a "substantial threshold showing." United States v. Wade, 112 S. Ct. at 1844. In the instant case, the Petitioner made such a showing before the district court.

Prior to sentencing, Petitioner showed that not only did he fully disclose

his and others' participation in the criminal activity, he was brought to court for three consecutive days in anticipation of providing testimony. The government's holding him out as their witness directly resulted in a co-defendant pleading guilty. Nevertheless, the government argued he had not been truthful based on the statements of other co-defendants.

By filing his motion to enforce the plea agreement, Petitioner raised the issue of "bad faith" and "arbitrariness" on the part of the government. This was unlike the defendant in Wade, who only sought enforcement of the plea agreement at the time of sentencing, and only on appeal argued that the government acted "arbitrarily" and in "bad faith." Clearly, the instant case is distinguishable from the failure to make a "substantial threshold showing," as found

by this Court in Wade. Finally, Petitioner openly disputed the claims of the government and sought the co-defendants statements and filed a "Motion For Ad Testificandum" in order to confront and cross-examine these individuals. Simply put, this was literally the only means to show the government was acting "arbitrarily" and in "bad faith," and thus, motivated by unconstitutional reasons. Petitioner clearly made a showing, outside of his assistance, to meet the threshold which entitled him to receive the requested statements and/or an evidentiary hearing.

The panel has rendered an opinion that effectively deprived the Petitioner of the means of making the requisite showing of a breach of a plea agreement, as established in United States v. Wade, supra. Therefore, a compelling basis

exists for this Court to grant the instant Petition for Writ of Certiorari.

CERTIFICATE OF SERVICE

I hereby certify that forty (40) copies of the foregoing Petition for Writ of Certiorari and its Appendix were mailed by the undersigned to the United States Supreme Court on the 28 day of July, 1995. I also certify that true copies of the foregoing Petition of Writ of Certiorari were mailed to the following parties, via United States mail:

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Philip H. Hilder

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2717
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MAURICIO RUEBEN,

Defendants-Appellants.

Appeal from the United States
District Court for the
Southern District of Texas

(March 31, 1995)

Before DUHÈ, WIENER and STEWART, Circuit Judges. PER CURIAM:[1]

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion

In this direct criminal appeal by Defendant-Appellant Mauricio Rueben[2], the sole issue of consequence is whether the plea agreement between Rueben and the government was breached when the government in its discretion determined that Rueben had failed to provide substantial assistance and thus refused to file a motion for a downward departure at sentencing. Concluding that in the plea agreement the government retained its discretion, and in exercising it acted neither arbitrarily and capriciously when determining that Rueben had failed to provide substantial assistance nor unconstitutionally or with an unconstitutional motive in not filing the

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should not be published.

[2]In the record, the defendant's surname is spelled "Rueben"; however, in his appellate brief, he spells his name "Reuben." For record consistency, we here use the spelling used in the record.

motion to depart downward, we affirm the rulings of the district court and thus the sentences it imposed on Rueben.

I.

FACTS AND PROCEEDINGS

Pursuant to a plea agreement, Rueben pleaded guilty to conspiracy to possess with intent to distribute over 1000 kilograms of marijuana and money laundering. The plea agreement provided that the government would file a motion for a downward departure if-in its discretion-Rueben was determined to have provided substantial assistance.

Rueben was interviewed several times by a government agent and two prosecutors. After the second interview, the prosecutors were convinced that Rueben was not being completely truthful, and backtracking, and was not fully admitting his own guilt. That in turn led the government to conclude that Rueben had not

provided substantial assistance and that it was not bound to file a motion for downward departure based on substantial assistance.

Rueben filed a motion to delay sentencing and sought a hearing on his assertion that the government had breached the plea agreement. He also filed a motion for discovery to prepare for that hearing. The district court granted a delay in sentencing, after which Rueben filed a motion for specific performance of the plea agreement or, alternatively, to withdraw his guilty plea. The district court ordered the government to bring specified documents to the hearing for the court to examine and then determine which if any of the documents should be furnished to Rueben.

The district court conducted that hearing, and Rueben's counsel received copies of notes taken by the government

during its interviews of Rueben. After the hearing, the district court determined that the government had made a prima facie showing that it had a rational basis for refusing to file a substantial assistance motion for downward departure under § 5K1.1 of the guidelines; and the court denied Rueben's motion for specific performance of the plea agreement. In its subsequent memorandum opinion the court stated that the subject notes "demonstrate the government's contemporaneous concern over the veracity and comprehensiveness of Rueben's testimony. These concerns are valid, supported by the evidence, and enough to justify the government's exercise of discretion."

The district court sentenced Rueben to a 360 month term of imprisonment for the conspiracy offense, followed by a 10-year term of supervised release, and a

concurrent 240-month term of imprisonment on the money laundering offense, followed by a 3-year term of unsupervised release. Rueben timely filed a notice of appeal.[3]

II

ANALYSIS

Rueben contends that he is entitled to a downward departure for providing substantial assistance to the government, and that the government's arbitrary, bad faith refusal to file a § 5K1.1 motion constituted a due process violation. He also insists that he is entitled to specific performance of the plea agreement.

"[W]hen a guilty plea rests in any significant degree on a promise or agreement of the prosecutor, so that it

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[3]Rueben's notice of appeal will be treated as filed on the date of and after the entry of the judgment under Fed. R. App. P. 4(b).

can be said to be part of the inducement or consideration, such promise must be fulfilled." United States v. Valencia, 985 F.2d 758, 761 (5th Cir. 1993) (internal quotations and citation omitted). Rueben, as the party alleging a breach of the plea agreement, bears the burden of proving the underlying facts establishing a breach by a preponderance of the evidence. United States v. Garcia-Bonilla, 11 F.3d 45, 46 (5th Cir. 1993). To determine whether the government breached the plea agreement, the court must consider "whether the government's conduct is consistent with the parties' reasonable understanding of the agreement." Id. (internal quotations and citation omitted). This inquiry is a question of law, which we review de novo. Id.

The government's decision to seek a reduction of the defendant's sentence is

discretionary. See Wade v. United States, ____ U.S. ____, 112 S. Ct. 1840, 1843-44 (1992). The government nevertheless may bargain away this discretion in a plea agreement. United states v. Watson, 988 F.2d 544, 552 (5th Cir. 1993), cert. denied, 114 S. Ct. 698 (1994). We review the language of the plea agreement to determine if the government has retained its discretion to file a § 5K1.1 motion or has negotiated it away. Garcia-Bonilla, 11 F.3d at 47; Watson, 988 F.2d at 548.

Based on the following language in the plea agreement in Garcia-Bonilla, we found that the government had retained absolute discretion concerning whether to file a § 5K1.1 downward departure motion: "The defendant agrees that the decision whether to file [a 5K1.1] motion rests within the sole discretion of the United States." Garcia-Bonilla, 11 F.3d at 47.

In contrast, we held in Watson that the following language did not reserve the government's discretion to file a § 5K1.1 motion: "[I]f the defendant complies with section 5k1.1 of the sentencing guidelines, the Government will file a motion . . . asking for a downward departure . . . ." Watson, 988 F.2d at 548. See also United States v. Wilder, 15 F.3d 1292, 1295 (5th Cir. 1994) (plea agreement stating government will file motion "in the event it is determined that [Wilder[] provides substantial assistance" bound government to file motion).

When the government does retain its discretion to file the motion for sentence reduction, "a defendant who provides substantial assistance without receiving a downward departure is not entitled 'to a remedy or even to discovery or an evidentiary hearing' unless the

prosecution relied on an unconstitutional motive" in refusing to file the motion. Garcia-Bonilla, 11 F.3d at 46 (quoting Wade, 112 S. Ct. at 1844). Generalized allegations of an improper motive are insufficient to establish a constitutional violation. Wade, 112 S. Ct. at 1844. On the other hand, when the government does not retain discretion, "a district court has authority to determine whether a defendant has satisfied the terms of his plea agreement, even if one of those terms deals with assistance to the government." Watson, 988 F.2d at 553.

Here, the district court reviewed the circumstances to determine whether the government had a rational basis for refusing to file the motion. The district court did not make an express finding whether the government had retained discretion to file a § 5K1.1 motion in the

plea agreement. Rather, in evaluating the plea agreement, that court in effect analyzed the case both ways: It considered whether the government correctly determined that Rueben had not provided substantial assistance; and it considered whether the government's refusal to file the motion was so arbitrary as to be unconstitutional. In so doing, the district court concluded that the government's interview notes established that its concern "over the veracity and comprehensiveness of Rueben's testimony . . . [was] valid, supported by the evidence, and enough to justify the government's exercise of discretion." The district court also concluded that the government had a rational basis for refusing to file the motion, and therefore did not act so arbitrarily as to be unconstitutional.

The plea agreement in the instant

case provides in pertinent part that "[i]f in the judgment and sole discretion of the United States, the defendant's cooperation amounts to 'substantial assistance,' the United States will file a motion for departure pursuant to Section 5K1.1 of the Sentencing Guidelines and Policy Statements which motion will recommend that the defendant be sentenced to a term of imprisonment of 15 years, not including supervised release." (emphasis added). The plea agreement also provides that "the defendant understands and agrees that the decision to file a motion for substantial assistance pursuant to 5K1.1 rests entirely with the United States. The defendant acknowledges that the refusal to file such a motion is not grounds for withdrawal of his guilty plea."

The language of the plea agreement in this case differs somewhat from that in both the Watson and Garcia-Bonilla

agreement. The instant plea agreement provides, in the declarative mood, that the government "will"-not, in the imperative mood, shall-filed a § 5K1.1 motion, if in its "judgment and sole discretion," the government determines that Rueben has provided substantial assistance. The agreement sub judice also provides that the decision to file the motion "rests entirely with the United States." The latter language closely resembles the language in Garcia-Bonilla. Although the instant agreement does not specifically state that the government retains "sole discretion" to make the motion, it employs that phrase to condition the obligation of the government in determining whether "substantial assistance" has been provided by Rueben. When read in context, the semantical differences between these phrases and

those in Garcia-Bonilla do not constitute a legal distinction. Also, the instant agreement's statement that the government "will" (not shall) file the motion, being expressly conditioned on the government's discretionary determination whether Rueben has provided substantial assistance, clearly constitutes retention by the government of its discretion concerning the filing of a § 5K1.1 motion. Thus, only an arbitrary and capricious determination by the government that Rueben failed to provide substantial assistance, or a showing of an unconstitutional motive on the part of the government, could entitle Rueben to relief.

Rueben has clearly failed to meet his burden of showing that the government was arbitrary and capricious, i.e., that it abused its discretion, in concluding that

he failed to provide substantial assistance. As ordered by the court, the government presented its interview notes, which reflected that Rueben's statements were inconsistent with those of his co-defendants and were not completely truthful. Additionally, Rueben made no specific allegations and presented no evidence to show that he furnished substantial assistance to, and fully cooperated with, the government. Rather, he merely made a generalized allegation that he provided substantial assistance. His conclusional allegations are not sufficient to establish that the district court erred in finding that the government's refusal to file the motion was supported by the evidence and had a rational basis.

Rueben has also failed to make specific allegations or to present any evidence showing that the government acted

unconstitutionally or had an unconstitutional motion for not filing the § 5K1.1 motion. Again, his generalized allegation that the government acted arbitrarily and in bad faith falls well short of that which is needed to establish a constitutional violation.

Neither has Rueben shown that he is entitled to additional discovery or to an evidentiary hearing. The district court permitted limited additional discovery when it ordered the government to provide copies to Rueben of notes taken during the government's interviews of Rueben. Moreover, the court did hold a hearing on Rueben's motion for specific performance of the plea agreement. Although Rueben's counsel presented only oral argument at the hearing, he had the opportunity to present other evidence supporting Rueben's allegations, assuming any such evidence

existed.

Given the absence of merit in Rueben's claim, we are satisfied that the district court correctly determined that "Rueben [was] not entitled to [additional] discovery because the evidence already discovered [was] sufficient." For the foregoing reasons, the rulings of the district court are, in all respects, AFFIRMED.